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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 627.

AEROVIAS INTERAMERICANAS DE PANAMA, S.A., *et al.*,

and

LINEAS AEREAS DE NICARAGUA, S.A.,

Petitioners,

v.

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION.

Restatement of Questions Presented.

Review of the decision of the Court of Appeals could present but one question:

Whether Article 15 of the Chicago Convention imposes on the Dade County Port Authority an absolute obligation to charge foreign aircraft using Miami International Airport only the lowest rates paid by American aircraft engaged in international air services, regardless of reasonable classifications in respect of aircraft

charges, which are applied uniformly by the Authority to all aircraft alike, without distinction as to nationality.

That this was the question considered and determined by the Court of Appeals clearly appears from that court's opinion:

> "The District Court construed this article [Article 15] in a favored nation clause concept, but refused to consider it on the basis of determining the presence or absence of discrimination. It was treated as being an absolute requirement to the end that charges against appellees could be no higher than the lowest charges or rates paid by American nationals, no matter what the classification or circumstances. We disagree and reverse."
>
> Petitioners' Appendix, p. 3a.

Petitioners have made no effort to present this fundamental question or to demonstrate that Article 15 has the effect attributed to it by the District Court and rejected by the Court of Appeals. Instead, Petitioners assume that the Convention does absolutely grant foreign aircraft a right not to be charged rates higher than the lowest rate charged any American aircraft, "no matter what the classification or circumstances," and ask rhetorically whether Article 15, having that assumed effect, is rendered "ineffective" by Article 82 of the Convention (Question 1), and whether their assumed "rights" may be "nullified or avoided" by the effect of other considerations (Questions 2 and 3). Petitioners also ask the Court (Question 4) to decide whether certain bilateral agreements, entered into by the President of the United States and the executives of other signatories of the Chicago Convention pursuant to authority granted by the treaty and in the form annexed

to the treaty, secure to petitioners rights greater than those secured by the Convention itself.

Review of the questions posed by petitioners would be inappropriate, for those questions are not involved in the case at all. In phrasing their first three questions, petitioners have simply distorted some of the collateral reasons given by the Court of Appeals in holding that petitioners' assumed "right" under Article 15 does not exist. And the fourth question raised by petitioners asserts an argument that is not only new and unfounded but also conflicts with petitioners' repeated contentions that the executive agreements have the same effect bilaterally as the Chicago Convention has multilaterally.

Statement.

Respondent adopts the opinion of the Court of Appeals as containing a substantially accurate statement of the facts essential to this Court's consideration of whether petitioners have demonstrated genuine reasons for granting the review sought, and whether those reasons are special and important.

Argument in Opposition to Granting the Writ.

Petitioners seek special exemption from the uniform application of classifications in respect of airport charges that were established in 1946, which have been uniformly applied by the Authority since that time.

In 1945 and 1946, when the Board of County Commissioners undertook to establish a public airport in Dade County, the airlines upon whose patronage the success of the venture depended fell into two classifications: those who, at the outset, "joined with [the Board, acting in its statutory capacity as Port Authority] to establish and sus-

tain the airport in its infancy," and those who did not (Opinion of Court of Appeals, Petitioners' App. pp. 12a-13a).

The sustaining airlines[1] are those that executed 20-year leases and thereby committed themselves to use the airport and to sustain it in any losses for as long as the Authority desired to be so sustained. In turn, those airlines were guaranteed a share of any profits made by the airport as well as a favorable schedule of airport charges (R. 632-36). Because of the immediate financial success of the airport, the Authority elected on July 1, 1947 to terminate the profit-and-loss-sharing arrangement (R. 644, 660). The airport charges contracted for by the sustaining airlines will subsist until January, 1966 (R. 641, 671).

The prototype contract was an inseparable part of a transaction by which Pan American World Airways, Inc., transferred to the Authority the existing 36th Street Airport and cash in exchange for the Authority's 20-year bonds, payable solely from the Airport's anticipated revenues (R. 629, 640, 643, 656, 662). An identical contract was entered with Eastern Air Lines, Inc., from whom the Authority borrowed money with which it purchased adjoining airport property from the United States (R. 656, 663; Stip. Exh. 18, p. 16).

Such contracts were offered also at large to other airlines that were willing at the outset to identify their financial interests with those of the airport (R. 669). Two other United States airlines—National Air Lines, Inc., and Delta C & S Air Lines, Inc.—and one foreign airline—TACA Airways of the Republic of El Salvador—accepted lease contracts identical to those accepted by Pan American and Eastern (R. 629-30).

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[1] So designated by the Administrator of Civil Aeronautics (R. 668).

All airlines other than sustaining airlines were charged according to a different schedule of airport charges. That schedule was first announced on March 18, 1946, a few days before the airport opened (R. 648-49). One month later, landing charges applicable to those airlines were in some respects reduced (R. 651). On September 24, 1946,[2] the Authority adopted Resolution 56, which again reduced those charges and made them applicable prospectively to all users of the airport

> "except aircraft of lessees whose charges have been established by contract prior to the adoption of this Resolution." (R. 652.)

The charges established by Resolution 56, which have been and are paid by the vast majority of foreign and domestic airlines using the airport, are the charges of which petitioners complain.

It is not true that Resolution 56 established charges "for all airlines other than the Big Four" (Petition, p. 15). It established charges applicable to all airlines, regardless of size, supposed "importance," nationality or any other irrelevant consideration, other than those with whom the Authority previously became mutually bound because the young airport needed the security thereby afforded. There were five such airlines, not "Four," and one of them—TACA Airlines of El Salvador—can hardly be termed "Big." In the context of this case, the term "Big Four"

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[2] The statement in the lower court's opinion that Resolution 56 was adopted "on September 24, 1956" (Petitioners' App., p. 5a, 307 F. 2d 804) is a typographical error. The court understood clearly that the Resolution was adopted on September 24, 1946, as is shown by its next statement, that "Appellees commenced using the facilities thereafter, one as early as 1948."

is meaningless as a description,[3] but petitioners have found its use convenient as a way of ignoring TACA's existence and suggesting that the Authority's sustaining airlines have in common "sheer bigness and power" and "vast and extensive tentacles" (Complaint to CAB, R. 676).

The classifications thus established have been uniformly applied by the Authority since 1946. One of the original plaintiffs, Cubana de Aviacion, S. A., began service to Miami on April 15, 1946 (R. 682), but did not become a sustaining airline. Instead, Cubana sought the rights of a sustaining airline (and none of the attendant responsibilities) on the ground that, as Pan American's subsidiary, it was *ipso facto* entitled to the benefit of Pan American's contract (R. 664). That application was denied, as were the later applications of petitioners and all other foreign and domestic airlines (including Braniff International Airways, a United States airline operating internationally) that entered the airport after September, 1946 and, on one ground or another, sought exemption from the existing classifications (R. 664).

As will be seen, the experience of Braniff International Airways is of evidentiary value in determining, for the purposes of Article 15, what charges "would be paid by [United States] national aircraft" owned by international airlines who are otherwise situated as petitioners are situated. Petitioners seek improperly to imply (Petition, pp. 33; 34) that the Authority, by recently reducing Braniff's airport charges, has exempted Braniff from the uniform application of Resolution 56. That implication is false. Petitioners

[3] Of the four, only Pan American is "big" internationally. National carried only 3% of the Miami international traffic when it served Cuba (compared to Braniff, who petitioners say is "comparatively small" in carrying 2% of such traffic, Petition, p. 14), and it has since discontinued that service. Eastern and Delta do not operate internationally from Miami.

well know that the recent reductions were offered generally to all airlines serving the airport, including petitioners,[4] as a good faith attempt by the Authority to compromise and settle various disputes in respect to those charges. Some airlines accepted the proposal, but it appears that petitioners are more interested in reviving the unfounded $748,600 judgment of the District Court than they are in a prospective reduction of airport charges. The recent adjustment in rates, made in compromise settlement of disputes, does not add stature to petitioners' argument.

The only question is whether the Chicago Convention requires that foreign aircraft be accorded special treatment that is unavailable to American aircraft.

Because petitioners have devoted themselves to presenting and discussing academic questions that do not bear on the basic issue, it is necessary that the sole question involved be clearly identified.

By Article 15 of the Chicago Convention, the United States undertook to assure that airport charges for foreign aircraft "shall not be higher . . . than those that would be paid by its national aircraft engaged in similar international air services" (R. 686). The crux of the matter, therefore, is what charges "would be paid" by such national aircraft of the United States.

Petitioners have assumed in each court below, and they assume here, that Article 15 will be and ought to be read as though it specifically provides that charges for foreign aircraft shall not be higher than "the rates charged United

[4] To the Court of Appeals, we stated: "The Commissioners have been and are willing to compromise the disputes involved in pending litigation on the same basis by entering into similar contracts with the litigating airlines, and hereby offer so to do." (R. 724-25.)

States national aircraft (*such as Pan Am*)" (Petition, p. 24, emphasis added). The assumption is a violent one, and it should not be relegated to parenthetical importance.

The District Court adopted petitioners' theory and held that the "mandatory language" (R. 399) of Article 15 constitutes an "absolute command" (R. 401) that foreign aircraft not be charged higher rates than those "imposed upon Pan Am and National" (R. 426). This theory, which was "the only legal theory upon which this cause was permitted to proceed" by the District Court (R. 382), has the effect of exempting petitioners, simply because they are foreigners operating aircraft of foreign registry, from the effect of classifications that remain applicable to all United States airlines and aircraft, irrespective of whether they operate domestic or international air services. The discriminatory effect of the District Court's interpretation of Article 15 was exactly as stated by Philip Schleit, Esq., petitioners' counsel here, in his brief for appellants upon the appeals of three United States airlines from the District Court's refusal to hold the classifications themselves to be unreasonable:

> "Hence, if the foreign airlines prevail as a class, there will be but a comparative handful of United States airlines at the Miami International Airport left to pay the higher airport charges. This would leave the United States airline Appellants and other United States airlines in a small group of high-paying carriers. This, in itself, would operate as 'unjust discrimination.'"
>
> Brief for Appellants, p. 14.[5]

[5] *Regina Cargo Airlines, Inc., et al.* v. *Board of County Commissioners of Dade County, Florida*, No. 18,133, U. S. Court of Appeals for the Fifth Circuit. The appeals were dismissed on appellants' motion before oral argument (see certified copy of that court's order dated March 8, 1960).

The decision of the Court of Appeals in the instant case was that the District Court had improperly interpreted Article 15 (Petitioners' App., p. 3a). Finding that petitioners "have at all times been afforded uniform conditions" and that charges paid by foreign aircraft were not higher than those paid by American aircraft "of the same class for the purpose of charges" (Petitioners' App., p. 10a), the Court of Appeals concluded that Article 15 does not constitute

> "an absolute requirement to the end that charges against appellees could be no higher than the lowest charges or rates paid by American nationals, no matter what the classification or circumstances."
>
> Petitioners' Appendix, p. 3a.

This question of law is the only question that would be presented on review of the lower court's decision.

Relief was not claimed or granted by the District Court on a theory that the Resolution 56 charges are unreasonable or that the Authority's contracts with the sustaining airlines are illegal.

Petitioners' Fifth Amended Complaint, upon which the District Court granted relief, made no claim that the Resolution 56 rates are unreasonable. Agreeably to the "only legal theory on which this cause was permitted to proceed" by the District Court (R. 382), petitioners stipulated that the reasonableness of those charges is not in issue (R. 631) and pleaded only that the charges applicable to them are higher than those paid by Pan American and National (R. 135). The District Court, at petitioners', behest, declared:

> "[T]he test is not the 'reasonableness' of the charges imposed but that the charges 'shall be no higher than' according to the provisions under consideration." (R. 400.)

It is therefore irrelevant as well as misleading for petitioners to suggest that the rates are unreasonable in the extreme and that they pay an "average charge per aircraft landing" that is "1800% higher than that for the Big Four" (Petition, p. 15). Petitioners' exaggerated comparison is based principally on the fact that the schedule applicable to sustaining airlines as well as the schedule applicable to all other airlines provides for smaller charges per landing as the number of landings increases in each monthly period (R. 632-33, 653). Obviously, the "average charge per aircraft" for any airline operating numerous flights would be lower than the "average charge per aircraft" paid by airlines having few landings. That would be true regardless of the schedule applied, whether the sliding scale applied is that of Resolution 56 or that of the lease contracts.

The reasonableness of the contract rates and of the Resolution 56 rates is therefore not an issue in the case. In a proceeding in which the reasonableness of the Resolution 56 charges *was* put in issue by petitioners, the Administrator of Civil Aeronautics held that "such rates and charges are fair and reasonable" and that they "compare favorably with the rates and charges now being imposed at other comparable airports" (R. 668, 669).

Nor does this case involve the application of the Sherman Act, as interpreted by this Court in *United States* v. *St. Louis Terminal*, 224 U. S. 383, relied on by petitioners (Petition, p. 47), or of the Robinson-Patman Act, relied on by petitioners in the Court of Appeals (Brief for Cross-Appellants, p. 9). Neither does the case involve the legality of the Authority's contracts with the sustaining airlines. The Fifth Amended Complaint (R. 148) made no attack on the Authority's contractual obligations to the sustaining airlines. The sustaining airlines have never been made

parties to this proceeding. Their contracts are and must be regarded as valid and subsisting. *Trans World Airlines, Inc.* v. *City and County of San Francisco* (9th Cir., 1955), 228 F. 2d 473, *cert. den.*, 351 U. S. 919. Petitioners urged in the Court of Appeals that the District Court erred in failing

> "to enjoin the use of a sliding scale of landing charges granting volume discounts to large United States airlines not based on cost differentials . . . ." (R. 479.)

but they now disclaim any intention to question the legality of the Authority's contracts with the sustaining airlines, and deny ever having made such a claim (Petition, p. 38, n. 18).

Relief was not claimed or granted by the District Court on a theory of unjust discrimination.

Claims of unjust discrimination against nonsustaining airlines were made by petitioners' original Complaint in the District Court and were based on the Federal Airport Act and the Surplus Property Act (R. 10, 11). But that complaint and petitioners' later pleadings raising that issue were dismissed by the District Court, together with the similar claims of four United States airlines based on unjust discrimination (R. 381). On their cross-appeal to the Court of Appeals, petitioners made no point of the District Court's dismissal of those pleadings, and relied exclusively on the theory adopted by the District Court.

The Complaint on which the decree of the District Court was based (R. 148) does not allege that the classification by which sustaining airlines are distinguished from all other airlines was unreasonable in 1946 or at any time thereafter. That pleading seeks relief for a class of foreign airlines, not for a class of nonsustaining airlines. The

decision of the District Court was that the Chicago Convention guarantees certain treatment to foreigners and that, because the Convention does not "employ the term 'just'" or "speak of discrimination" (R. 400), it is blind to all classifications based on other considerations.

On petitioners' motion (R. 171), the District Court struck (R. 174) from the Authority's Answer the allegations (R. 168) by which the Authority sought to demonstrate the reasonableness of the classifications giving rise to different airport charges for sustaining airlines and for all others.

It therefore is inappropriate for petitioners to argue that there was no basis for a distinction between sustaining airlines and all others, because the sustaining airlines allegedly "furnished no valuable consideration" for their contracts (Petition, p. 38).[6] That unfounded contention is but another attempt by petitioners to draw attention from the "only legal theory on which this cause was permitted to proceed" in the District Court (R. 382). Similarly, petitioners irrelevantly argue that they were not given an opportunity after September 1946 to "sign leases or contracts" like those held by sustaining airlines (Petition, pp. 41-42). Neither was any other nonsustaining airline. The implication in petitioners' presentation, that nonsustaining

[6] Petitioners' suggestion (Petition, pp. 40-41) that nonsustaining airlines would somehow "have been required" by the Authority to bear the airport's deficits is a new contention, made for the first time to this Court. Only those airlines that contracted to pay assessments for that purpose (R. 637) could have been obligated to do so. Petitioners speculate that nonsustaining airlines could have been required to pay "increased landing charges" in the year following that in which the deficit occurred (Petition, p. 41). Aside from the fact that there is no evidence that the Authority ever conceived of it, that plan could not have required contribution by nonsustaining airlines "ratably in accordance with the number of flights scheduled to land during the fiscal year in which deficit occurred" (R. 637). In fact, the Authority could not have required that such airlines land any aircraft "in the second year" (Petition, p. 38).

airlines were unjustly discriminated against as a class, is irrelevant as well as untrue. A trial on contentions of unjust discrimination would involve issues and evidence materially different from those submitted by petitioners to the District Court. See, *e.g.*, *Interstate Commerce Commission* v. *United States*, 289 U. S. 385.

When certain petitioners and certain United States airlines complained to the Administrator of Civil Aeronautics that the classifications in respect of charges were unreasonable and constituted an unjust discrimination against non-sustaining airlines (A. 37), within the proscription of the Federal Airport Act of 1946, the Administrator held that such was not the case:

> "... it is our opinion that, inasmuch as the fees and charges imposed against the sustaining airlines in the 1945 agreements are considered to have been reasonable in the light of the circumstances prevailing at the time of execution of such agreements, and as the fees and charges now being imposed against all other carriers (including the head tax and cargo tax and the charges imposed against the suppliers of such carriers) are considered reasonable in the light of all circumstances now prevailing, the Port Authority cannot be said to be unjustly discriminating against the latter group of carriers." (R. 670.)

The Administrator explained his decision as follows:

> "In reaching this conclusion we have taken into consideration, among other things, (1) the provision in each of the agreements which, in effect, constituted an underwriting of the bonds then being issued by the Port Authority to finance the acquisition from Pan American Airways of the Miami airport; (2) the fact that in order to market the bonds it was necessary at that time for the Authority to provide

some type of security other than the then anticipated but unknown revenues, such as was provided in the underwriting of the bond issue by the sustaining airlines; (3) the fact that the schedule of landing fees and charges prescribed in the original lease agreements with the sustaining airlines compares favorably with landing fees and charges at other comparable airports in effect at that time; (4) the fact that similar agreements were offered to all other carriers then operating on the Miami International Airport; and (5) the fact that it was not unusual in 1945 for an airport owner to enter into agreements with airlines providing for the leasing of space on the airport and the use of the landing facilities at prescribed rentals and landing fees and charges, for terms of 15, 20 and 25 years. Further, it is our view that the Dade County Port Authority had adequate authority under applicable law to enter into agreements such as those entered into with the sustaining airlines." (R. 669.)

The Court of Appeals properly interpreted Article 15 as requiring that airport charges assessed against foreign aircraft for the use of the airport should not be higher than those assessed against United States aircraft similarly situated.

The Court of Appeals found that petitioners and other foreign airlines had been afforded the same "uniform conditions" upon which the airport was made available for use by all other aircraft and properly concluded that Article 15 of the Chicago Convention requires only that charges for foreign aircraft be not higher than those that "would be paid" by national aircraft "of the same class for the purpose of charges" (Petitioners' Appendix, p. 10a). The aircraft of petitioners are of the same class, for the purpose of charges, with all aircraft, of any nationality and in any kind of service, domestic or international, "except

aircraft of lessees whose charges have been established by contract prior to the adoption" of Resolution 56 (R. 652).

In their original Complaint petitioners alleged that they occupy "a similar position" with all other foreign and domestic airlines except the sustaining airlines (R. 16). And certain petitioners and certain other foreign airlines claimed to the Administrator of Civil Aeronautics that they were "similarly situated" with the four United States airlines who joined in their complaint and with other airlines not parties to that complaint (R. 667). Those statements are obviously true. It cannot reasonably be supposed that the United States, by subscribing to the Chicago Convention, intended to require that airports within its jurisdiction must thereafter give special and discriminatory preference to foreign airlines simply because they are foreigners.

There is no shred of proof in the record that the Authority has ever discriminated against an aircraft because of its nationality. The charges that "would be paid" by foreign aircraft of similar size [illegible] prior to September, 1946, is shown by the fact that TACA Airways, of El Salvador, made timely application for and was granted the right to [illegible] airlines. The charges that would be [illegible] nationally operating United States airlines not a sustaining airline is shown by the fact that Braniff International Airways applied in 1955 for special exemption from the Resolution 56 rates, and the Authority rejected its application. The case ends there.

The Chicago Convention had the expressed purpose of assisting the development of international aviation "on the basis of equality of opportunity" (R. 686). Even petitioners rely on authority that foreign aircraft are due "the

same treatment as accorded" national aircraft (Petition, p. 29). The Court of Appeals rightly held that the contracting States sought to abolish any "distinction as to nationality" (Petitioners' App., p. 9a). In the name of those principles, the District Court arbitrarily exempted foreign airlines from the uniform operation of Resolution 56, so as to create a palpably unjust discrimination in favor of petitioners and against those United States airlines, who, like petitioners, never bore the responsibilities of sustaining airlines. It was the District Court, and not the Authority, that sought to create an arbitrary distinction based on nationality. The District Court's decision to do so was properly reversed.

The decision of the Court of Appeals is therefore in complete harmony with the decisions of this Court principally relied on by petitioners (Petition, p. 38): *Asakura* v. *Seattle*, 265 U. S. 332, 340, in which the Court dealt with a treaty guaranteeing Japanese liberty in the United States to "carry on trade . . . upon the same terms as native citizens . . . , submitting themselves to the laws and regulations there established"; *Nielsen* v. *Johnson*, 279 U. S. 47, 51, in which the Court held, in respect to the offending Iowa statute,

> "That there is a discrimination based on alienage is evident. . . ."
>
> 279 U. S. at 51;

Bacardi Corp. v. *Domenech*, 311 U. S. 150, 155, in which a "glaring discrimination" against foreign trade marks, apparently aimed "so as to exclude only the plaintiff," was struck down by the Court; and *Clark* v. *Allen*, 331 U. S. 503, in which the Court gave effect to a treaty overcoming discriminatory legislation against foreign heirs and devisees.

The construction placed on the Chicago Convention by the Court of Appeals is also in complete harmony with this Court's decision in *Todok* v. *Union State Bank*, 281 U. S. 449, in which the Court rejected as "repugnant to the purpose of the treaty" a construction of a treaty that "would appear to place an alien owner of a homestead in Nebraska on a better footing than that of a citizen of the state." The Court held that "it is not to be supposed" that the treaty was intended to secure for aliens arbitrary exemption from "reasonable requirements . . . imposed upon both aliens and citizens without discrimination." 281 U. S. at 454, 455.

The four "questions" presented by petitioners (Petition, pp. 2, 3) in some ways resemble certain collateral reasons given by the Court of Appeals for its basic decision. But petitioners, instead of expressing these collateral matters "in the terms and circumstances of the case," as required by this Court's Rule 23(1)(c), have distorted the lower Court's reasoning almost beyond recognition.

First Question: The Authority insists, and the Court of Appeals agreed, that the application of reasonable classifications to all airlines and to all aircraft, irrespective of nationality, is not a practice inconsistent with Article 15 of the Chicago Convention. The Court referred to the Authority's contracts with sustaining airlines as "infraterritorial inconsistencies" (Petitioners' App., p. 11a) and held that such "inconsistencies" were not forbidden by Article 15. The Court simply held that any attempt to remove all reasonable classifications, so that every aircraft would be charged "equally" with every other aircraft, regardless of circumstances, is necessarily a political and not a judicial responsibility under Article 82. It should be noted that the Authority in 1957 assured the Administrator of Civil Aeronautics, in effect, that the "inconsistent" pro-

visions of the sustaining airlines' contracts would be "terminated as soon as such action can lawfully be taken," to-wit: when they expire by their own terms in December, 1965 (R. 671).

The Court did not, as claimed, commit "a shocking perversion of language" or otherwise justify petitioners' lengthy attack (Petition, pp. 23-30) on this portion of its opinion. Certainly, the Court of Appeals did not hold that the Convention was not "self-executing" (Petition, p. 27); the Court did not even discuss that academic question, holding as it did that in any event the treaty did not have the particular "self-executing" effect claimed by petitioners.

SECOND QUESTION: In determining what charges "would be paid" by United States aircraft "of the same class for the purpose of charges" (Petitioners' App., 10a), the Court of Appeals quite properly recognized that Braniff International Airways pays the Resolution 56 rates, is the only United States airline other than Pan American now operating internationally and is the only international United States airline "of the same class" with petitioners. Petitioners' second point is that this fact should be ignored by the Court (Petition, pp. 31-34). But this is not a case of the Authority discriminating against Braniff as an excuse to discriminate against foreigners,[7] as in *Rayeardi Corp.* v.

[7] The Authority has never made the "Braniff argument" attributed to it by petitioners (Petition, p. 34), that the Authority need only discriminate against Braniff to justify discrimination against foreigners. The suggestion that counsel for the Authority argued to the Court of Appeals "in breach of its stipulation" before a district judge (Petition, p. 34) is wholly unwarranted, as is shown in our *Objections and Response to Appellees' Motion to Supplement Record on Appeal*, R. 721, *et seq.* Petitioners continually attempted to introduce new "evidence" before the Court of Appeals, and they continue in that effort before this Court, by printing in their Appendix (p. 41a) an irrelevant letter dated November 29, 1962, from a State Department lawyer to Mr. Schleit.

Domenech, 311 U. S. 150. The same charges "would be paid" by any new United States airline undertaking international service. Petitioners claim ambiguously that Article 15 requires "absolute equality" (Brief for Appellees, p. 49)[*] and that it does not contemplate "equality" with Braniff but "equality" with Pan American, which is claimed to compete more with petitioners. This argument is an afterthought. Neither Article 15 (R. 686) nor petitioners' Fifth Amended Complaint (R. 148) says anything about competition or competitors, and the legal question here involved would be the same if the positions were reversed and Braniff were the sustaining airline and Pan American the nonsustaining airline.

THIRD QUESTION: Petitioners find great fault (Petition, pp. 34-38) with the comments made by the Court of Appeals (Petitioners' App., p. 35a) upon the "favored nation clause concept" applied by the District Court in interpreting Article 15. The Authority never contended and the Court of Appeals did not decide that the Chicago Convention contains a most favored *foreign* nation clause, which is the subject of extended analysis by petitioners (pp. 34-38).

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[*] Petitioners' notions of "absolute equality" change from time to time. Petitioners successfully importuned the District Court to award them "refunds" of amounts allegedly paid by them in excess of what petitioners would have paid, calculated according to the schedule applicable to sustaining airlines (R. 428). On their cross-appeal, petitioners contended that "absolute equality" required that each of their aircraft be charged only the average charge per aircraft paid in a given period by Pan American, in respect of its greater number of landings (Brief for Cross-Appellants, p. 8). Eventually petitioners recognized that Article 15 speaks of "aircraft" charges and not of "airline" charges (R. 686), and suggested that the principle of "absolute equality" would dictate that they be charged, for each landing of their aircraft, one-thirtieth of the monthly rate applicable to daily scheduled flights of sustaining airlines above 270 flights per month, or about eighty-three cents (Brief for Appellees, p. 38).

Obviously, the Chicago Convention does not guarantee foreigners the most favored treatment extended to any foreigner. The contracting States agreed to treat foreigners as they treat nationals. But that does not constitute a guarantee that all foreigners will be accorded the treatment given the citizen who, because of reasonable classifications applicable infraterritorially, happens to occupy the most attractive position. That was the "favored nation clause concept" applied by the District Court, which might be more accurately termed a "most favored national aircraft clause concept." The United States agreed that each airport open to its national aircraft "was to be open under uniform conditions to the aircraft of the other contracting nations," and the Court of Appeals recognized that agreement (Petitioners' App., p. 10a). The authorities cited by the Court of Appeals are indeed "analogous to the instant situation" (Petitioners' App., p. 12a), in that they show that the application of reasonable classifications may be applied even under a "most favored nation" concept, unless the contrary intention is clearly expressed by treaty.

Fourth Question: Petitioners' fourth question introduces an argument made for the first time in this Court, that the various agreements between the President of the United States and the chief executives of several foreign countries grant petitioners rights greater than the rights established by the Chicago Convention. But those agreements were executed in substantially the form suggested by the Chicago Conference itself (Petition, p. 43), and the contracting States undertook "not to enter" any "obligations and understandings" inconsistently with the treaty (Article 82). It is unreasonable to suggest that, after the Senate advised and consented to the Chicago Convention, the President of the United States thereupon set about, in

violation of the treaty and without the authority of the Senate, to extend to foreigners greater rights than those secured by the treaty. In the District Court the petitioning Panamanian airline, whose country did not ratify the Convention until recently, urged that the executive agreement with its nation had the same effect in this case as the Chicago Convention. And the District Court held that there was no "legal difference" (R. 391). The Court of Appeals assumed, as petitioners contended, that the Panamanian executive agreement "is as effective as the Chicago Convention" (Petitioners' App., p. 2a). In view of the fact that both of the lower courts adopted petitioners' contentions in this respect, it is inappropriate for petitioners to suggest that the opinion of the Court of Appeals "fails to deal with the issue" (Petition, p. 45). The bilateral executive agreements cannot in any case rise to greater stature than the multilateral treaty. *Reid* v. *Covert*, 354 U. S. 1, 17, n. 33.

The Court of Appeals properly interpreted the Chicago Convention consistently with laws of the United States.

In holding that Article 15 of the Chicago Convention does not purport to proscribe differences in charges based on reasonable classifications, applied uniformly and irrespective of nationality, the Court of Appeals properly construed the treaty consistently with prior and subsequent Acts of Congress on the same subject. It was that Court's duty to do so. *Whitney* v. *Robertson*, 124 U. S. 190; *Baker* v. *Carr*, 369 U. S. 186, 212.

The Fourteenth Amendment to the Constitution of the United States, upon which certain United States airlines relied in their pleadings (R. 26), forbids the States to deny any person the "equal" protection of the laws. But that provision condemns only arbitrary discrimination; and not

classifications resting on reasonable distinctions and differences in position. See, e.g., *Allied Stores of Ohio, Inc.* v. *Bowers* (1959), 358 U. S. 522. By the Civil Aeronautics Act of 1938 Congress proscribed "unjust discrimination" in the charges of carriers by air. 52 Stat. 993, as amended, Tit. 49 U. S. C., §1374(b). By the Federal Airport Act of May 13, 1946, Congress specifically required adherence to that principle by airports, as a condition to the granting of Federal aid:

> "The airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination . . . ."
>
> 60 Stat. 176, 49 U. S. C., Sec. 1110(1).

It is significant that Congress enacted the Federal Airport Act in the very midst of hearings by the Senate Foreign Relations Committee regarding proposed ratification of the Chicago Convention. *Hearings on Executive A before the Committee on Foreign Relations, United States Senate*, 79th Cong., 1st and 2nd Sess., *passim*. The Senate obviously regarded Article 15 of the Chicago Convention as being consistent with the proscription of unjust discrimination incorporated in the new Federal Airport Act. It is preposterous to suppose that, in July, 1946, the Senate would advise and consent to a treaty that extended to foreign airlines, simply because they are foreigners, rights greater than those secured to United States airlines by the unjust discrimination proscription of the Federal Airport Act, enacted two months earlier, in May.

By the Act of July 30, 1947, the Surplus Property Act of 1944 was amended to require that "all property transferred for airport purposes shall be used and maintained for the use and benefit of the public, without unjust dis-

crimination." 50 App. U. S. C., Sec. 1622(g)(2)(B). And again, the Act of March 18, 1950 applied the same principle to airports established and operated by the National Park Service. 16 U. S. C., Sec. 7d.

The Court of Appeals was obliged to construe the treaty consistently with acts of Congress enacted before and since the treaty was adopted, so as to give effect to each. *Whitney* v. *Robertson*, 124 U. S. 190. The lower court was obliged to construe the treaty, if possible, so that the Federal Airport Act of 1946 should not be repealed by it, and so that the principle of the treaty itself would not be rendered impotent by the subsequent amendment of the Surplus Property Act. *United States* v. *Lee Yen Tai*, 185 U. S. 213; *Baker* v. *Carr*, 369 U. S. 186, 212. The "only legal theory upon which this cause was permitted to proceed" by the District Court (R. 382) did violence not only to the letter and spirit of the treaty but also to the intention of Congress as repeatedly expressed. Petitioners' theory of recovery was properly rejected by the Court of Appeals.

Conclusion.

The decision of the Court of Appeals is in complete harmony with this Court's prior decisions. Petitioners have shown no departure, substantial or otherwise, from the ordinary course of judicial proceedings. The questions posed by petitioners are not genuine and they are not substantial. There are no special and important reasons for a review of the decision below. Indeed, the persistent attempts by petitioners to submit this case on ever-expanding issues other than the simple issue on which it was properly decided by the Court of Appeals makes it singularly inappropriate that it be heard again.

The difference in charges of which petitioners complain has already been mitigated by the Authority's attempts in good faith to adjust the existing disputes. The difference will be eliminated entirely in December, 1965, as "the present separate classifications of the two groups will then cease to exist." (Opinion, Petitioners' App., p. 10a). We cannot say whether the petitioning airlines are owned by their governments (Petition, p. 47), for that fact does not appear in the record. But if those governments deem it a "continuing source of friction in Latin-American relations" (Petition, p. 47) that their aircraft are admitted to Miami International Airport on the same conditions as are imposed on American aircraft, then those governments are asking too much of the Authority and of the Chicago Convention.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Proof of Service.

I, CHESTER BEDELL, attorney for the respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of December, 1962, I served a copy of the foregoing Brief in Opposition on the petitioner by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Philip Schleit, Esq., 1757 K Street, N. W., Washington 6, D. C.; J. Leo McShane, Esq., 740 Ingraham Building, Miami 32, Florida; and William D. Donnelly, 1625 K Street, N. W., Washington 6, D. C.

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